REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 148 OF 2010

GEOFREY MUTHINJA……...……APPELANT

VERSUS

BARNABAS KIMATHI…….RESPONDENT

J U D G M E N T

1. The appellant who was the plaintiff at the lower court sued the respondent through a plaint dated 18th January, 2005 seeking special damages of Kshs.197,722/- loss of user of motor vehicle Reg. No.KAM 173R for normal matatu business for 12 days at a rate of Kshs.3500/- per day with costs and interest.

2. The respondent filed defence and counterclaim dated 8th March, 2005 seeking special damages of Kshs.243,000, loss of user as pleaded with costs and interests. The appellant filed reply to defence and defence to counterclaim dated 11th March, 2005.

3. The trial magistrate after hearing plaintiff/appellant and his witnesses and the defendant/respondent with his witnesses dismissed the appellant's suit and allowed the respondents counterclaim averring the respondent proved specials of Kshs.19,000/, Kshs.230,000/- for loss of his motor vehicle, loss of user for Kshs.90,000/- totaling to Kshs.339,000/- with costs and interests.

4. The appellant being aggrieved by the trial court's judgment preferred this appeal setting out six(6) grounds of appeal being as follows:-
    i. ***The Senior Principal Magistrate erred in law by finding the appellant liable at 100% when there was clear evidence that the two motor vehicles collided.***
    ii. ***The learned senior principal magistrate erred in law by making a finding that, the plaintiff did not call a police officer when the defendant did not do the same on the counterclaim.***
    iii. ***The learned Senior Principal erred totally by failing to evaluate the totality of the evidence on record and thus arriving at a wrong decision.***
    iv. ***The learned Senior Principal Magistrate clearly erred in evaluating the evidence for loss of user without proof in favour of the defendant. The sum of Kshs.90,000/- arrived at***

was without iota of proof.

v. ***The learned Senior Principal Magistrate erred in law and in general knowledge by apportioning liability as evidence on record demanded.***

vi. ***The Senior Principal Magistrate's decision/judgment is not supported by any known civil jurisprudence and hence it is wrong and unreasonable.***

5. That on 29th January, 2014 court granted directions that the appeal be determined by way of written submissions. The appellant filed his submissions on 16th April, 2014 whereas submissions on behalf of the respondent were filed on 28th April, 2014. The appellant proposed to combine grounds of appeal Nos.1,5 and 6 and argue them as one ground and grounds number 2,3 and 4 separately, however in his written submissions he argued ground no.1,2,3 and 4 only but separately which I propose to consider as submitted whereas the respondent combined all his arguments and argued them as one. That each counsel attached authorities in support of their respective submission which court shall consider.

6. The court is alive of the fact that this is a first appeal and it had no opportunity of seeking and hearing the parties to determine their demeanor as the trial court did, however, it is going to evaluate the whole evidence and come to its own conclusion.

7. The appellant's first ground of appeal is that the trial Senior Principal Magistrate erred in law by finding the appellant liable for the accident at 100 percent when there was clear evidence that the two motor vehicles collided and as such he ought to have apportioned liability between the two, failure to where of its decision is challenged as being wrong. The appellant gave evidence and called three witnesses whereas the respondent gave evidence and called four witnesses. The appellant who gave evidence as PW1 was not at the scene of the accident but received information of the accident from his driver who gave evidence as PW3. PW2 a motor vehicle assessor equally was not at the scene of the accident and so was PW4 who was attached to Meru Motor Vehicle inspection. The respondent and his witness DW1, and DW4 were eye witnesses who witnessed the occurrence of the accident between the appellant's vehicle Reg. No.KAM 173R and the respondent's vehicle reg. No.KPR 848. PW3 the driver of M/V Reg. NO.KAM 173R blamed the driver of M/V Reg. No.KPR 848 for the accident. He stated in his evidence:-

> ***"I was driving M/V KAM 173R I was driving towards Meru Town. I moved off the road. When I could not move beyond a certain point, I stopped. This is where the other motor vehicle hit me. The driver of the other motor vehicle caused the accident."***

8. During cross examination of PW3 he stated:-

> ***"I saw the motor vehicle when it was about 3 meters from me. The road was straight at the scene. At 3 meters I saw it coming to my lane. I had seen the other motor vehicle from a distance of about 20 meters at the first distance. I went off the road on the left when I saw it coming to my lane. The collision was off the road on the left."***

9. The respondent on his part called DW1 who was his passenger in M/V NO.KPR 848 who stated in his evidence……

> "***I was a passenger. I was seated on the left at the front. A matatu from the opposite direction came. It was KAM 173, Toyota Hiace. It was very fast. I saw a passenger waving for the matatu to stop but it did not stop. There were potholes on its lane. It came to our lane . it came to our lane. It's the left side as one faces Nanyuki. Our driver applied emergency brakes and moved to the extreme left. The matatu hit the land rover which turned to face the direction it was coming from. It did not overturn. The matatu did not overturn. It stopped on the left as one faces Meru. As one faces Meru, the matatu, stopped a few meters in front of our land rover.***

10. In cross-examination DW1 testified:-

" The point of impact was on the left lane as one faced Nanyuki"

11.DW3, the respondent herein testified as follows:-

> ***"when I reached at the show ground there was an oncoming vehicle on high speed. The motor vehicle was KAM 173R. when it was avoiding potholes it hit my motor vehicle which turned and faced the direction it came from. the potholes were on the Nanyuki-Meru lane. It came to my lane when it was about 10 paces in front of me. I applied brakes and motor vehicle stopped on my side. There was a ditch and I could not swerve off the road."***

12.DW4 a bystander on the road who witnessed the accident stated:-

> ***"I was waiting for a vehicle to Meru town at the tarmac. I saw a matatu approaching from Nanyuki. This was KAM 173R. I stopped but did not stop was on very high speed."***

13.The trial Magistrate considered the varying versions of how the accident occurred and he stated that he believed the defendant's reasons because the appellant called his driver whose evidence was controverted by the respondent and his witness. The court pointed out that the appellant's evidence would have been weighty had he called other independent evidence such as that of a police officer who visited the scene of the accident. I believe the trial court did not mean to state without Police Officer's evidence liability could not be proved as submitted by the Appellants Counsel but was pointing out the importance of independent evidence and gave an example of Police Officer's evidence on the point of impact of the accident. The court found the respondent's evidence convincing as it explained the occurrence of the accident and for what reason whereas the appellant's version did not. Where there is independent evidence other than that of the drivers as to where and how the accident occurred and the court believes one version to the other there is no requirement for apportionment of liability as there is doubt in the mind of the court as to who is to blame for the accident.

14.In the instant case the trial court which had the opportunity of seeing and hearing the parties found the evidence of the respondent and his witness credible and in such a situation the appellate court which did not have such an opportunity need not interfere with such a conclusion. In the case of **HCCA 46 OF 2003 WASTUSWADE OPANDE V KRA & ANOTHER,** Hon Mr. Justice Mwera, (as he then was) stated :

> ***" where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial, the appellate court hardly interferes with the conclusion made by the trial court after weighing the credibility of the witnesses."***

15.This court in view of the above can only interfere with the conclusion made by the trial court after weighing the credibility of the witnesses. I find the evidence by the respondent consistent and corroborative and uncontroverted by the appellant and that the trial Magistrate was not in error in his conclusion on liability. I find no merits in ground No.1 of the appeal. It must fail.

16.The appellant in ground No.2 of the appeal avers that the senior principal magistrate erred in law by making a finding that the appellant/plaintiff did not call a Police Officer when did defendant/respondent did not do the same on the counterclaim. The trial Magistrate in his judgment did not state the appellant's claim could not succeed because he had not called a police officer but was in evaluating the evidence pointing out that the appellant had only called the driver whose evidence was controverted by the respondent and his witness and without any other independent evidence the trial could not believe the appellant's version of how the accident occurred. On the other hand the trial court heard independent evidence to support the respondent's case hence there was no need of a police officer's report on scene visit. The respondent proved his counterclaim on balance of probability and I find the trial court correctly

found so. The 2nd ground of appeal must also fail.

17. The appellant combined grounds No's 3 and 4 of the appeal and argued them together submitting that the learned senior Principal Magistrate erred in failing to evaluate the totality of evidence on record, and particularly by awarding Kshs.90,000/- as loss of user to the respondent. The appellant in support of the two grounds gave a brief summary of documents produced by the appellant and those produced by the respondent. He urged the respondent did not produce books of account to justify the earning of Kshs.1,500/- per day and further no single document was produced to back the claim of loss of user. The appellant referred to attached authorities, however he was not specific as to which authority he relied upon. I have perused the authorities but did not find them relevant to the grounds of appeal. The respondent under paragraph 8 of his counterclaim stated:-

> ***"Further the defendant has been hiring alternative means of transport at a rate of Kshs.5,000 per day. The defendant claims loss of user in the sum of Kshs.5,000 per day for a period of 60 days."***

18. The respondent had pleaded he had been hiring means of transport at a rate of Kshs.5000/- per day and claimed loss of user in the sum of Kshs.5000/- per day for a period of 60 days. He prayed for such sum. This was a special claim which was specifically pleaded and need to be specifically proved. It was not pleaded under general damages. The respondent in his evidence, as DW3, averred he was using his vehicle in business and he was hiring a motor vehicle for 35,000/- for 60 days. The motor vehicle Assessor gave evidence for respondent as DW5 and produced his report as exhibit 5. Exhibit 5 shows that the vehicle was damaged beyond economic repair and was recommended to be treated as a total loss. The trial Magistrate failed to consider that the respondent in his counterclaim was obligated to prove the hiring of the vehicle at a rate of Kshs.3,500 per day and prove he was entitled to such sum and for the period alluded to of 60 days. The trial court did its calculating which was not based on any evidence and came to actual loss of Kshs.1500/- per day for 60days and awarded Kshs.90,000. The trial court fall into an error when it failed to appreciate that the claim for loss of user was specifically pleaded and was supposed to be specifically proved and that it was not a claim for general damages in the instant case for court to assess damages. Significantly the court failed to note the respondent's vehicle was a complete write-off and what he was entitled to was compensation for the vehicle but not loss of user. There is further no basis of applying non-user for 60 days as the trial court was made to do. I find that the Kshs.90,000/- for non-user should not have been awarded at all. I find merits in grounds No.3 and 4 of the Memorandum of Appeal and the same are allowed. The total sum awarded to respondent by trial court of Kshs.339,000/- is therefore reduced by Kshs.90,000.- leaving a balance of Kshs.249,000.

19. The upshot is that the appellant's appeal partially succeeds with half costs on higher scale on the appeal, the lower court judgment is substituted by Kshs.249,000/- in favour of the respondent with costs and interest at lower court.

DATED, SIGNED AND DELIVERED AT MERU THIS 6TH DAY OF NOVEMBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Ondari for the appellant

Mr. J. G. Gitonga for the respondent

J. A. MAKAU

JUDGE